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Supreme Court of the United States

October Term, 1963

No. 180

ISTHMIAN LINES, INC.,

Petitioner,

against

GEORGE E. STREET,

Respondent.

BRIEF ON BEHALF OF RESPONDENT GEORGE E. STREET IN OPPOSITION TO THE PETITION OF ISTHMIAN LINES, INC. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

There are no questions properly presented on behalf of the petitioner Isthmian Lines, Inc., for review by this court. The jury's verdict in favor of the plaintiff was based, not upon the mere happening of the accident, but upon probative evidence from which the jury could infer that the tool with which plaintiff was furnished was not reasonably fit to cut off the end of the turnbuckle with reasonable safety.

The alleged questions which the petitioner advances as questions to be resolved by this court are inaccurately framed and do not reflect the testimony adduced at the trial.

FACTS

Plaintiff was employed by the defendant as a junior third assistant engineer aboard the SS ANDREW JACKSON, a vessel owned by Waterman Steamship Corporation, but which was bareboat chartered to the defendant, Isthmian Lines, Inc. On December 25th, 1956 the vessel had returned from a voyage in the Far East, at which time representatives of the owners had come aboard for the purpose of effecting redelivery of the vessel to Waterman Steamship Corporation.

On the morning of December 26th, plaintiff was assigned by the first assistant engineer to open up the port boiler. After plaintiff began to work on the boiler, the first assistant engineer locked up all the tools in the tool shop, including all the hacksaws, with the exception of a few wrenches and a hammer and chisel (R7a).* There was testimony to the effect that this was done to keep the tools from being stolen. While plaintiff was working on this boiler, two men, who were dressed like longshoremen, approached him, showed him a turnbuckle and asked him if he would cut off the end of this turnbuckle for them. Plaintiff assumed that, in cutting off the end of the turnbuckle for these men, he would be helping the cargo operations (R15a, R16a).

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*a numbers refer to pages in appendix of defendant-appellant-petitioner.

The plaintiff intended to use a hacksaw for this purpose (R5a, R17a, R18a) and went to the tool shop looking for one. He found, however, that the tool shop was locked. He then went to the engine room log desk and looked for the key to the tool shop, which was usually kept there for the use of the engineering officers. When he did not find the key there, plaintiff went back to the machine shop where he met the first assistant engineer (R5a).

At that time the plaintiff informed the first assistant engineer that he wanted to get a hacksaw to cut off the end of the turnbuckle, which he had in his hand, for the two fellows who were standing nearby, and he asked the first assistant engineer for the key to the tool shop (R18a). The first assistant engineer told the plaintiff that the key to the tool shop was in his room, and that he was in a hurry (R5a, R6a, R19a) and left, so plaintiff decided to cut the end off the turnbuckle with a cold chisel. The plaintiff did not attempt to get the key to the tool shop from the first assistant engineer's room, because he testified that the first assistant engineer kept his room locked and that he did not have access thereto (R8a) or permission to go in there (R19a). Plaintiff thereupon placed the turnbuckle on an anvil on the deck and began to cut through the neck of the turnbuckle with the hammer and chisel. As the plaintiff cut off the end of the turnbuckle, it flew up and struck him in the left eye.

There was testimony by the plaintiff to the effect that when a hammer and chisel were used for the purpose of cutting steel, that a piece of steel might fly up from it or off to the side (R25a). Plaintiff also testified that although

there were goggles aboard the ship they were only intended to be used with the emery wheel, and since the goggles were made of glass they would not have protected him from the end of the turnbuckle, which flew up and struck him, as the glass would have shattered. The goggles were intended to prevent sand or emery dust from entering the eyes of someone using the emery wheel (R25a). Plaintiff also testified that it was his practice to use a hacksaw to cut steel, and that he didn't go around chopping things (R26a).

The first assistant engineer Syre D. Griffiths testified that he remembered Street asking him for a key to the tool shop but that he had no recollection of the plaintiff asking him for the key to the tool shop for the specific purpose of getting a tool to cut the end off a turnbuckle (R131a). He claimed that he knew nothing about plaintiff's accident, or the cause of the injury to plaintiff's eye (R133a), and that he was only looking for a piece of material that could have caused the accident (R2b), when he went to the engine room after plaintiff had been injured and unerringly picked up the end of the turnbuckle (Defendant's Exhibit B in evidence) from amongst numerous other objects on the deck in the machine shop (R2b)."

Although the chisel was physically able to cut off the end of the turnbuckle, the first assistant engineer testified that in his opinion the proper tool for that purpose was a hacksaw (R135a), which was the tool that plaintiff had first tried to obtain. The first assistant engineer also testified that, in his opinion, the hacksaw was the safest tool for that purpose (R138a).

R numbers refer to pages in appendix of plaintiff-appellee, respondent.

STATEMENT

The trial court and the court of appeals committed no error in relying on this court's opinion in *Ferguson v. Moore McCormack Lines, Inc.*, 352 U. S. 521 (1957) since this decision is directly in point. The facts in the *Ferguson* case and the facts in the case at bar are quite similar. In *Ferguson*, the plaintiff, being unable to remove the ice cream with the conventional scoop, used a butcher knife, which the Supreme Court said the defendant should have foreseen he would do. In the case at bar, plaintiff, being unable to obtain the hacksaw, used a hammer and chisel, which the defendant in this case should have foreseen he would do. In both cases the tool used by the plaintiff was physically capable of accomplishing the desired result, but neither tool was reasonably fit to accomplish the desired result with reasonable safety to the person using it. In both cases the defendant failed to furnish the plaintiff with a proper tool and one reasonably fit to be used with reasonable safety. The fact that the vessel supplies a tool which is not defective does not mean that the vessel has complied with its warranty of seaworthiness. The claim was made in both cases that the tool supplied was not the proper tool and the court in *Ferguson* held that the fact that there was no tool close at hand which would have *safely* performed the task was sufficient evidence to take the case to the jury.

In the case at bar, there is sufficient evidence that the hammer and chisel were not the proper tools to *safely* perform the job of cutting off the end of the turnbuckle. The plaintiff testified, and indeed the jury could draw of the

own common sense and experience, with respect to the possibility that a piece of metal being cut by a chisel was likely to fly up or to the side (R25a). The plaintiff testified that when a hammer and chisel were used for the purpose of cutting steel, a piece of steel might fly up from it or off to the side, that it was his practice to use a hacksaw to cut steel, that he himself first went to look for a hacksaw and resorted to the chisel and hammer only when he found that the hacksaw was not available. The first assistant engineer testified that a hacksaw was the proper tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw himself. It was on the basis of this testimony that the trial judge submitted the unseaworthy cause to the jury, not without evidence, as stated in the petition.

Judge Hays in the case at bar, based his opinion upon the same testimony and evidence and came to the conclusion that

> "on the basis of this evidence and its own experience the jury [ ] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put."

Far from losing sight of the "reasonably fit" concept of the warranty of seaworthiness as laid down by this court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), Judge Hays, in fact, very plainly relied thereon.

REASONS FOR DENYING THE WRIT

1. There are no questions of importance presented for review by this court.

Notwithstanding the broad general statements of the petition with respect to the importance of the "questions" presented and the alleged intra and inter circuit conflicts, there is, in fact, no real issue presented, requiring the intervention of this court. The decision in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), and the statement of the doctrine of seaworthiness therein, require no clarification. There is no real conflict with respect thereto, either within the Second Circuit or between that circuit and any of the others. In point of fact all of the cases cited by the petitioner are in accord and all follow the *Mitchell* doctrine.

The question presented by the petitioner is based entirely upon the false premise, created by it out of whole cloth, that the holding of Judge Hays' opinion is that "the happening of an accident itself may be sufficient to permit the jury to infer that a tool was not 'safe'".

The true holding of the court appears in the opinion at page A-4 of the Appendix to the Petition as follows:

> "In the course of the trial the first assistant engineer on the vessel, who had been going to sea since 1941, and had been an engineer since 1949, testified that a hacksaw was the 'proper' tool to use for the purpose for which the plaintiff used the cold chisel, and that he would have used a hacksaw. Moreover, the plaintiff himself first went to look for a hacksaw, and resorted to the chisel and hammer only when he found that the hacksaw was not avail-

able." On the basis of this evidence and its own experience,[1] the jury, "which plays a pre-eminent role in these Jones Act cases,"[2] could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put."

2. The decision of the Court of Appeals in the case at bar is consistent with and does not conflict with the holding of the United States Supreme Court in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

Judge Hays' decision in the case at bar is not only in accord with the majority of cases concerning the warranty of seaworthiness decided by the Court of Appeals for the Second Circuit, but is in accord with this court's holding on seaworthiness in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960), wherein it was held that the shipowner was under an absolute duty to furnish a vessel and appurtenances reasonably fit for their intended use.

The "reasonable fitness" doctrine of *Mitchell* must be read with the "*reasonable safety*" doctrine previously expounded by this court in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), and these two when read together establish the extent of the shipowner's absolute duty, which is to furnish a vessel, equipment and appliances which are reasonably fit to accomplish the purpose for which they are intended *with reasonable safety*.

---

[1] As Judge McGohey correctly stated in the course of the trial, the jury could infer "from what happened here, based on their own experience in life, that this kind of operation that the man did, whether he thought it was dangerous or not, was, in fact, dangerous and that this tool was, in fact, inadequate to do that job safely."

[2] *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957).

The doctrine of reasonable safety appears as far back as 1942 in *Jacob* v. *City of New York*, 315 U. S. 752, in which this court said at page 756:

> "... it was for the jury to decide whether a monkey wrench was a *reasonably safe* and suitable tool for petitioner's work. ..." (Italics added)

Again, in 1944, in *Mahnich* v. *Southern Steamship Company*, 321 U. S. 96, this court said at page 104:

> "These conditions, which have generated the exacting requirement that the vessel or the owner must provide the seaman with seaworthy appliances with which to do his work, *likewise require that safe appliances be furnished when and where the work is to be done*." (Italics added)

In *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521 (1957), this court clearly stated the shipowner's duty to furnish tools which could be used with reasonable safety in the following statement:

> "We conclude that there was sufficient evidence to take to the jury the question whether respondent was negligent in failing to furnish petitioner with an adequate tool with which to perform his task. ... There was evidence that the scoop with which he had been furnished was totally inadequate to remove ice cream of the consistency of that which he had to serve. ... There was no showing that any device was close at hand which would have *safely* performed the task.
>
> Respondent urges that it was not reasonably foreseeable that petitioner would utilize the knife to loosen the ice cream. But the jury, which plays a pre-eminent role in these Jones Act cases (Jacob v.

> New York City, 315 US 752, 86 L. ed. 1166, 62 S. Ct. 854; Schulz v. Pennsylvania R. Co., 350 US 523, 100 L. ed. 668, 76 S. Ct. 608), could conclude that petitioner had been furnished no *safe* tool to perform his task. * * *
>
> Because the jury could have so concluded, the Court of Appeals erred in holding that respondent's motion for a directed verdict should have been granted. 'Courts * * * should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function.' Wilkerson v. McCarthy, 336 US 53, 62, 93 L. ed. 497, 505, 69 S. Ct. 413." (Italics added)

Although, as pointed out by the Court of Appeals in the opinion below, in both the *Ferguson* and *Jacob* cases the complaint sounded only in negligence, it is clear that the rationale of the court's opinions in both cases applies equally to claims of unseaworthiness.

Again, in 1960, in *Michalic* v. *Cleveland Tankers*, 364 U. S. 325, this court held that testimony that a wrench was beaten, battered, old or chewed up was sufficient to allow an inference by the jury that it could not be used *safely* for the function for which it was designed, and as recently as 1961, in *Pinto* v. *States Marine Corporation*, 296 F. 2d, page 1, the District Court judge in a charge approved by the Court of Appeals for the Second Circuit stated that

> "The essential test is whether, considering place and circumstance, the area was reasonably fit to permit Pinto to perform his tasks with *reasonable safety*." (Italics added)

Thus, it can clearly be seen that the duty of the ship-owner is to furnish tools and appliances not merely reasonably fit, but reasonably fit to be used with reasonable safety. And Judge Hays' statement in the present case "on the basis of this evidence and its own experience the jury, which plays a pre-eminent role in these Jones Act cases, could find that a cold chisel was not a reasonably fit and safe tool for the purpose to which it was put" directly conforms with the decision of this court in *Mitchell* v. *Trawler Racer* (*supra*).

3. There is no conflict between the decisions of the Court of Appeals for the Second Circuit and the decisions of the Court of Appeals for the First, Fifth and Ninth Circuits.

The decisions cited by petitioner in the First, Fifth and Ninth Circuits, as allegedly conflicting with the decisions of the Court of Appeals for the Second Circuit are actually in accord therewith. The alleged conflict is nothing more than an abortive attempt to create such an inter-circuit conflict in an effort to bring its petition within the purview of Rule 19 of this Court's rules.

There is no conflict between *Arena* v. *Luckenbach Steamship Company*, 279 F. 2d 186 cert. den. 364 U. S. 895 (1960), decided by the United States Court of Appeals for the First Circuit and the decision of the Court below, in the instant case. In *Arena* the court stated at pages 187 and 188:

> "The defendant having had nothing to do with the loading of the vessel, liability depends upon proof of defective *or improper equipment*."

> * * * A vessel is not unseaworthy simply because the improper type of equipment was used by someone *unless, also, it appears that the proper type was unavailable. In the ice-cream case, of which plaintiff makes much, the waiter's use of a knife was forced upon him by the absence of the proper tool. Ferguson v. Moore-McCormack Lines*, 1956, 352 U. S. 521, 522, 77 S. Ct. 457, 1 L. Ed. 2d 511." (Italics added)

Morales v. City of Galveston, 231 F. 2d 97 and *Lieberman v. Matson Navigation Company*, 308 F. 2d 668 are also in accord with *Mitchell v. Trawler Racer* (*supra*) and the case at bar insofar as their understanding and application of the warranty of seaworthiness as described in the *Mitchell* case is concerned. None of these cases hold that the warranty of seaworthiness requires that a shipowner furnish a tool which is foolproof, whereas all of them are in agreement that the warranty of seaworthiness requires that a shipowner furnish tools and appliances reasonably fit for their intended use with reasonable safety. There is, clearly, no conflict between the decisions of the Courts of Appeal for the First, Second, Fifth and Ninth Circuits which would justify the granting of certiorari.

1. There is no intra-circuit conflict within the Second Circuit as to the alleged questions presented by this petition which would warrant granting certiorari. The dissent of one judge in four different cases and the dissent of two judges in a panel of nine sitting en banc does not constitute intra-circuit conflict of decision.

Contrary to the statement contained in the petition, there are no factions within the various panels of the Second Circuit and there is no intra-circuit dispute in the Second Circuit concerning the application of this court's holding

on the warranty of seaworthiness in *Mitchell v. Trawler Racer* (*supra*). Judge Clark has indeed dissented from the majority opinions in the *Pinto*, *Paddu*, *Ezekiel* and *Nuzzo* cases, but the existence of a lone dissenting voice, no matter how often raised, cannot and does not create an intra-circuit conflict. To hold otherwise would require this court to review any Court of Appeals decision which was not unanimous, which is obviously not the intent of Rule 19 or of this court. Actually, in some of the very cases cited by petitioner as allegedly constituting intra-circuit conflict, to wit, the *Pinto*, *Hooper*, *Ezekiel* and *Richter* cases, the petitioners made the same claim of intra-circuit conflict, but in each of these cases this court denied certiorari. The fact of the matter is that all the decisions of the various panels of the Court of Appeals for the Second Circuit are in conformity with the reasonable fitness concept of the warranty of seaworthiness as enunciated by this court in *Mitchell v. Trawler Racer* (*supra*), and even Judge Clark in his dissenting opinions does not advocate the imposition on the shipowner of insurer liability for unseaworthiness, but conforms to this concept of reasonable fitness.

In *Ezekiel v. Volusia Steamship Co.*, 297 F. 2d 215 (1961) cert. den. 369 U. S. 843 (1962), in one of the very dissenting opinions cited by petitioner as allegedly constituting intra-circuit conflict, Judge Clark made the following statement at page 218:

> "Liability for failure to furnish a seaworthy vessel is absolute, but a vessel need not be accident-free to be 'seaworthy.' Liability for injuries caused by the vessel and its appurtenances accrues only when the owner has failed to furnish a vessel and appurtenances 'reasonably fit for their intended use.'

> Mitchell v. Trawler Racer, Inc., supra, 362 U. S. 539, 550, 80 S. Ct. 926, 932, 4 L. Ed. 2d 941. On the other hand, this does not mean, as my brothers seem to believe, that he must make only reasonable efforts to furnish seaworthy appliances. He has an absolute duty to furnish a reasonably fit ship."

Since this is the very same language used by Mr. Justice Stewart in the *Mitchell* case, petitioner's contention that the language of the *Mitchell* case is irreconcilable with the position of Judge Hays in this case and the dissenting opinions of Judge Clark is beyond comprehension and is obviously without merit. A more exact conformity with the holding of this court in the *Mitchell* case would be hard to conceive.

In *Pinto* v. *States Marine Corporation*, 296 F. 2d 1 (1961), cert. den. 369 U. S. 843 (1962), Judge Clark in his dissenting opinion made the following statement on page 8, which clearly shows his position to be one of conformity rather than conflict with this court's holding in the *Mitchell* case:

> "* * *, our duty is surely to apply the presently prevailing law and leave the question of further change to the Court itself. Furthermore, the Court's manifest intent to safeguard human lives at sea and, to enforce the shipowner's responsibility by strict liability is not one to combat."

A reading of Judge Clark's dissenting opinions in the *Puddu* and *Nuzzo* cases also reveals that he does not advocate insurers liability for the shipowner for unseaworthiness, but adheres to the reasonable fitness concept.

Significantly, and contrary to petitioner's contention, in *Pudda v. Royal Netherlands Steamship Company*, 303 F. 2d 752 (1962) cert. den. 371 U. S. 840 (1962), Judge Hays wrote a concurring opinion in which he quite clearly shows that he does not interpret this court's holding in the *Mitchell* case as requiring absolute liability on the ship-owner regardless of reasonable fitness. On page 757, in the *Pudda* case, Judge Hays made the following statement:

> "The difficulty with the concept of unseaworthiness arises from the fact that while the authorities hold that there is liability without fault, there is no case which holds that there is absolute liability."

In *Nuzzo* v. *Rederi*, 304 F. 2d 506 (1962), Judge Clark dissented because he felt that the majority were introducing negligence concepts into the law of unseaworthiness and not because he felt that perfection was required, rather than reasonable fitness for intended use. The reason for his dissent is succinctly set forth on page 512 in the following statement:

> "But the opinion of the majority overruling the findings below appears to reintroduce negligence concepts into the law of unseaworthiness, and thus to overthrow, by a kind of covert counterrebellion, the rule of absolute liability laid down in Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561, and Seas Shipping Co. v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, and recently reaffirmed in Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941."

Unfortunately, the petition herein at pages 10 and 11 misquotes a portion of Judge Hays' opinion below as a comparison of the petition and the opinion itself as set forth

in the appendix will readily show. What Judge Hays actually said in the portion misquoted by petitioner was as follows:

> "As in the case at bar, there was no defect in the tool selected, nor was the tool 'unfit' in the sense that it could not accomplish the task. But as in the case at bar, the jury could conclude from the circumstances of the accident that plaintiff 'had been furnished no *safe* tool to perform his task.' 352 U. S. at 523."

Petitioner further confuses the situation by stating that Judge Hays is paying lip service to the *Mitchell* case in this quotation, whereas, in fact, Judge Hays' reference was to the opinion of this court in the *Ferguson* case. To further complicate and compound the confusion, petitioner further misquotes Judge Hays as allegedly acknowledging that the chisel used by the plaintiff in the case at bar was reasonably fit, whereas the most solace and comfort that petitioner could possibly derive from the above quotation is Judge Hays' opinion that the chisel was not unfit in the sense that it could not accomplish the task of cutting the end off the turnbuckle. Concededly, the chisel was capable of physically chopping the end off the turnbuckle, but this is a far cry from quoting Judge Hays as acknowledging that the chisel was reasonably fit. To say that a tool is not unfit to accomplish a stated purpose is not the same as saying that this tool is reasonably fit to accomplish this purpose with reasonable safety. This distortion of Judge Hays' opinion merely serves to further highlight the desperate attempts of the petitioner to create a question for review when no such question, in fact, exists.

Not only did the Court of Appeals in the present case apply the test for seaworthiness as set forth in the *Mitchell* case, and as interpreted by the majority in the *Nuzzo*, *Puto*, *Richter* and *Ezekiel* cases, but it properly did not and should not have reversed the District Court's refusal to grant the defendant's motion for a directed verdict, because there was sufficient probative evidence that the cold chisel was not reasonably fit to cut the end off the turnbuckle with reasonable safety.

3. There was sufficient probative evidence of negligence and unseaworthiness which entitled plaintiff to a jury trial on these issues.

The whole thrust of petitioner's argument herein, as it was at the trial and on the appeal below, is directed towards its contention that there were no probative facts from which the jury could draw the reasonable inferences necessary to its verdict. However, since there was in fact proof that the tool which plaintiff in the case at bar was using was improper, inadequate and not reasonably fit to cut off the end of the turnbuckle with reasonable safety, and that the proper tool was unavailable to him, there was sufficient probative evidence from which the jury could have drawn reasonable inferences of negligence and unseaworthiness. The trial judge did not submit the case to the jury upon the theory that liability for breach of warranty could be inferred from the mere happening of an accident, but as previously stated, upon the basis of testimony by the plaintiff to the effect that when a hammer and chisel were used for the purpose of cutting steel, a piece of steel might fly up from it or off to the side, that it was his practice to use a hacksaw to cut steel, that he himself first went to look

for a hacksaw and resorted to the chisel and hammer only when he found that the hacksaw was not available, and upon the basis of testimony by the first assistant engineer that a hacksaw was the proper tool to use for the purpose for which the plaintiff used the cold chisel, and that he, himself, would have used a hacksaw. Thus, there was probative evidence from which the jury could have inferred that the chisel was not reasonably fit to chop off the end of a turnbuckle with reasonable safety, and there was evidence of negligence and unseaworthiness which entitled plaintiff to a jury trial on these issues.

The trial court and the Court of Appeals for the Second Circuit unquestionably applied the "reasonable inference" test as set forth by this court. The rule concerning submission of cases to a jury in *Jones Act* and *FELA* cases is expressed by this court in *Rogers* v. *Missouri Pacific Railroad*, 352 U. S. 500 (1957) as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

In *Rogers* the Supreme Court went on to say:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out

whether or not the evidence allows the jury a choice of other probabilities."

See also

Webb v. *Illinois Central Rail Road Co.*, 352 U. S. 512.

In *Tennant* v. *Peoria and P. U. Railway Company*, 321 U. S. 29, the Supreme Court stated the rule that probative facts must be presented from which negligence and causal relation could reasonably be inferred. The court then went on to state at page 35:

> "If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors."

In the same case at page 35, the Supreme Court said

> "* * * It is the jury not the court which is the fact finding body. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Since the record herein reveals probative facts and evidence upon which the jury could and did draw inferences and make findings that the defendant was negligent and the vessel unseaworthy, the case was properly submitted to the jury on both of these theories. As pointed out in the opinion below, this court in 1942, in the *Jacob* case,

supra, held that it was for the jury to decide whether a monkey wrench was a reasonably safe and suitable tool for petitioner's work and the fact that the case was close was no reason for the court to usurp the function of the jury. So, in the case at bar, it was for the jury to decide whether a hammer and chisel were reasonably safe and suitable tools for the plaintiff's work and the case was properly submitted to them for such determination.

CONCLUSION

The opinion below, the various dissenting opinions in the Second Circuit and the decisions of the Courts of Appeal in the First, Fifth and Ninth Circuits, all follow the reasonable fitness concept of the doctrine of seaworthiness as enunciated by this court in the *Mitchell* case. There is no conflict among them and not one of them has placed the shipowner's obligation to provide a seaworthy vessel at the point of insurer liability. Since there was probative evidence that the chisel was not reasonably fit to cut off the end of a turnbuckle with reasonable safety, there was sufficient evidence to entitle plaintiff to a jury trial and to support the jury's verdict in his favor.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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